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5. Eminent Domain (§ 19*)—Statute Authorizing City to Acquire Land Additional to that Required for Street Held Unconstitutional as Authorizing the Taking for Other than a "Public Use."—Acts 1916, c. 71, in so far as it amends Acts 1906, c. 194 (Code 1910, § 3065, par. 2), authorizing in street opening proceedings to acquire land in excess of that required and to replat and dispose of the excess in such manner as it may see fit, where such land is injuriously affected by the taking of a portion thereof for street purposes, held unconstitutional; the taking of such excess portion of the land not being for a "public use" within the Constitution limiting the taking or damaging of private property to a "public use."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Use. For other cases, see 5 Va.-W. Va. Enc. Dig. 78, 79.]

Error to Hustings Court of Richmond.

Petition by the City of Richmond to condemn land, opposed by James D. Carneal and others. Petition dismissed as to a portion of the land sought to be taken, and the city brings error. Affirmed.

H. R. Pollard, of Richmond, for plaintiff in error.

J. Thomas Hewin, *Jas. T. Carter*, *J. Samuel Parrish*, *D. C. O'Flaherty*, and *H. W. Goodwyn*, all of Richmond, for defendants in error.

TOWN OF GORDONSVILLE *v.* ZINN.

March 17, 1921.

[106 S. E. 509.]

1. Waters and Water Courses (§ 39*)—"Riparian Land" Must Be on Watershed of Portion of Stream in Question.—Land, to be "riparian" to a particular portion of a stream, must, as an essential condition, be located on the watershed of that portion of the stream.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Riparian. For other cases, see 10 Va.-W. Va. Enc. Dig. 342.]

2. Waters and Water Courses (§ 39*)—Land Opposite Point below Plaintiff's Land Not Riparian to Portion of Stream above.—Where defendant's land touched a stream both above and below plaintiff's land, but the dwelling house was opposite a point in the stream below plaintiff's land, and any surplus water from the dwelling house would return to the bed of the stream below plaintiff's land, the dwelling house land is not riparian to the portion of the stream above plaintiff's land.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 342.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

3. Waters and Water Courses (§ 47*)—Water Rights Incident to Riparian Lands Cannot Be Used on Adjoining Nonriparian Lands.—

Where defendant owned lands on which was a dwelling house, lying back of plaintiff's riparian lands and touching the stream below plaintiff's lands, and also owned a strip connecting such lands with the stream above plaintiff's lands, she could not use the water rights incident to such riparian strip on the dwelling house lands, by diverting water from the stream above plaintiff's land for use at the dwelling house; the dwelling house lands being nonriparian as to the portion of the stream at the point of diversion.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 679.]

4. Waters and Water Courses (§ 85*)—Diversion Will Be Restrained Only to Extent that It Causes Substantial Injury.—

A riparian owner's right to the use of water, to the extent that it exists, will be protected by injunction from substantial injury, actual or threatened, by the wrongful continuous diversion of the water by an upper riparian owner, but beyond this the court will not go, whatever may be the lack of abstract right in the upper riparian owner to divert the water.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 680.]

5. Waters and Water Courses (§ 47*)—Town Cannot Divert Water to Nonriparian Premises.—A town owning one acre of riparian land, on which it has constructed reservoirs, is limited to the use of the water on such land, and has no right to divert it to the town, a nonriparian locality.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 680.]

6. Waters and Water Courses (§ 47*)—Conveyance to Town Held to Convey Only Right to Use Water on Land Conveyed.—A riparian owner's conveyance of one acre of land to a town, on which it constructed reservoirs, with all water and water rights and privileges appurtenant thereto, gave the town no right to use any more of the water than was incident to its ownership of the land conveyed.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 684.]

7. Waters and Water Courses (§ 158 (2)*)—Agreement Held Not to Divest Riparian Rights.—An agreement between a town owning riparian land, on which it constructed reservoirs, and an upper riparian proprietor having constructed a reservoir for his own use, whereby the town was given a continuing right to enter on his land and make changes and improvements in his reservoir for the purpose of keeping the water clean and pure, held not to divest him and his heirs of any riparian rights which they would otherwise have possessed.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 684.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

8. Waters and Water Courses (§ 138*)—Right to Divert Water as against Upper Owners Not Obtainable by Prescription.—A lower riparian owner's diversion of water can confer no right thereto by prescription as against upper owners, as no cause of action ever arises in favor of upper owners so as to commence the running of the prescriptive period.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 312, 313.]

9. Waters and Water Courses (§ 152 (3)*)—Town Having Prescriptive Right to Divert Water May Enjoin Diversion by Upper Owner.—A town owning but one acre of riparian land, but which, by its adverse collection, dominion, and control of all the water of a stream, has acquired, as against lower owners, a prescriptive right to divert the water to its exclusive use, may enjoin an upper owner from diverting the water to nonriparian lands in such quantity as will in any degree diminish the quantity; it appearing that it would be substantially damaged in times of drought, and that its exclusive right would eventually be barred pro tanto by prescription, if such diversion was permitted.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 309.]

Other material matters are referred to in the opinion of the court.

Shackelford & Robertson, of Orange, for appellant.

McGuire, Riely, & Eggleston, of Richmond, for appellee.

RICHMOND CEDAR WORKS et al. v. HARPER et al.

March 17, 1921.

[106 S. E. 518.]

1. Appeal and Error (§ 1*)—Appeal Does Not Lie unless Jurisdiction to Entertain Is Conferred by Constitution or Statute.—An appeal from the decision of an inferior court or from a special tribunal organized for a special purpose does not lie unless jurisdiction to entertain such appeal is conferred by Constitution or statute.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 476.]

2. Master and Servant (§ 417 (4½)*)—Compensation Case Not Reviewable after Time Limit.—Under Workmen's Compensation Act, § 61, there can be no appeal from a decision of the Commission after the 30 days allowed therefor have expired.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 696.]

3. Master and Servant (§ 416½*)—New, Vol. 11A Key-No. Series—Enforcement of Compensation Award Provided for by Act.—Work-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.